

**Western
Pacific
Regional
Fishery
Management
Council**

November 11, 2005

Vice Admiral Conrad C. Lautenbacher
Under Secretary of Commerce for Oceans and Atmosphere
United States Department of Commerce
14th Street and Constitution Avenue, N.W.
Washington D.C. 20230

Dear Admiral Lautenbacher:

We are writing in response to findings issued by the National Oceanic and Atmospheric Administration (NOAA) on October 24, 2005, concerning the Western Pacific Regional Fishery Management Council's (Council) proposed fishery management regime for the proposed Northwestern Hawaiian Islands (NWHI) National Marine Sanctuary. While we take no pleasure in sending a letter of this nature, given the history of these proceedings, the Council believes that it is obligated to highlight its scientific and legal concerns associated with your recent rejection of the Council's April 14, 2005, proposal for fishery management regulations. It is our hope that this correspondence will trigger productive discussions that will benefit both proponents for the proposed NWHI sanctuary and proponents for responsible use of Hawaii's marine resources.

Overview of the Issue

On October 24, 2005, NOAA issued findings concerning the Council's April 14, 2005, draft fishing regulations for the proposed NWHI sanctuary. The Council prepared these regulations and their associated background materials pursuant to Section 304(a)(5) of the National Marine Sanctuary Act (NMSA), and in compliance with the Magnuson-Stevens Fishery Conservation and Management Act (MSA) after months of discussion and work with NOAA staff and managers. A summary of the Council's proposal and NOAA's response is attached as Appendix A.

Your October 24, 2005 letter, and the attached document entitled *Findings on the Recommendation of the Western Pacific Fishery Management Council Regarding the Management of Fisheries within the Proposed Northwestern Hawaiian Islands National Marine Sanctuary* ("Findings") states that NOAA has disapproved, in its entirety, the Council's April 14, 2005 recommendations regarding the management of fisheries within the proposed sanctuary. Needless to say, we were taken aback by the Agency's complete disregard of the Council's recommendations, and the Agency's apparent results-orientated approach to this process.

Based upon the Council's review of your letter and the attached Findings document, it is apparent that in its haste to reach a result, NOAA has (1) misinterpreted our recommendations; (2) ignored basic procedural and substantive requirements, such as compliance with the National Environmental Policy Act (NEPA), the Data Quality Act, the Administrative Procedures Act

(APA), the MSA, and the NMSA; and (3) failed to articulate a rational basis to reject the Council's recommendations. We address each of these issues below. It is the Council's view that the resulting Findings document produced by the Agency is not supported by credible scientific information, and is replete with conclusory and otherwise unsupported statements regarding the potential effects of the Council's recommendations regarding marine resources within the proposed marine sanctuary.

Given what we believe to be serious flaws present in the Agency's decision, the Council requests that NOAA withdraw its October, 2005, Findings document. In doing so, the Council recommends that NOAA establish a process whereby the Council and NOAA may work together to develop a scientifically- and legally-supportable fishery management program for the proposed sanctuary as contemplated by the MSA and NMSA. To facilitate the Council's participation in this process, the Council formally requests a complete copy of the Agency's administrative record supporting its October, 2005, Findings, including all internal and external Agency communications regarding this matter.

Summary of Technical and Scientific Issues Concerning the Findings

A fundamental problem with the Findings document is that it entirely ignores the Council's attempt to comprehensively address all fishery management programs within the proposed sanctuary. Current and proposed NWHI fishery management programs developed by the Council regulate fishing activities conducted by all fishing sectors, not just the commercial fishing sector. In its April 14, 2005, proposal, the Council recommended a moratorium on all fisheries (commercial, recreational, subsistence and sustenance fishing) for coral reef associated species, crustacean and precious corals until one or more science-based fishery ecosystem management plans for the NWHI could be developed by the Council, in consultation with the National Marine Sanctuary Program (as well as the State of Hawaii, the U.S. Fish and Wildlife and the U.S. Coast Guard in their roles as Council members) to address impacts on fish stocks and ecological components of the total ecosystem. Similarly, the Council recommended that pelagic fisheries (i.e. commercial, recreational, subsistence and sustenance) be allowed only by trolling and handline hook and line gear subject to federal permitting and reporting requirements.

The Findings document ignores the Council's proposed moratoria, instead focusing solely on the Council's proposed regulations for commercial fishing. The Findings document states only that commercial fishing recommendations made by the Council do not meet the goals and objectives of the proposed sanctuary, and thereafter fails to discuss all other elements of the Council's proposal. See Findings at 7 (Commercial Precious Coral Fishing); 8 (Commercial Coral Reef Species Fishing); 10 (Commercial Crustacean Fishing); 11 (Commercial Bottomfish/Pelagic Fishing) and 13 (Commercial Pelagic Trolling). Given the complete lack of specific findings on the matter, it is unclear whether the Council's proposed moratorium on recreational, subsistence and sustenance fishing for coral reef associated species, crustaceans and precious corals, and the proposed federal permitting requirements for non-commercial pelagic trolling, fulfills the goals and objectives of the proposed sanctuary and the purpose and policies of the NMSA.¹

¹ The Council finds it rather difficult to believe that the proposed moratoria fail to fulfill the purpose and policy of the NMSA. Further, the Council believes it inappropriate to simply omit consideration of these important components of the Council's proposed program without providing some rational explanation for doing so.

Aside from the overall lack of consideration of significant portions of the Council's April 14, 2005, recommendations, a number of significant errors, misstatements and omissions exist in the Findings document:

1. Page 7 of the Findings document states that "despite this information and data, recent recommendations from PAM call for changes in management measures to avert serious problems with the black coral fishery in the main Hawaiian Islands due to recruitment failures from overfishing and invasive species (WPFMC 2005)." This statement is patently false, and misleading. The citation provided by NOAA references findings made at a Council meeting that never in fact occurred. Further, the Council has never stated that overfishing is the cause of decline for black coral in the main Hawaiian Islands, or that such species have suffered a recruitment failure. This serious mischaracterization of available information speaks to the reliability of findings made by NOAA on this matter.
2. Page 12 of the Findings document states that NOAA rejected the Council's recommendations for bottomfish because such recommendations do not require the use of vessel monitoring systems (VMS) to address the need for data on individual fishing events. The Council is unable to identify a specific goal or objective for the proposed sanctuary that supports this statement, and it strongly suggests that NOAA has selectively interpreted its goals and objectives to support a pre-determined outcome of curtail all fishing activities in the proposed sanctuary.
3. Page 15 of the Findings document states that NOAA believes that prohibiting subsistence fishing except for Native Hawaiian subsistence is appropriate to maintain the natural character of ecosystem, particularly given uncertainties with allowing fishing in NWHI, and the need to err on side of resource protection. In making this statement, however, NOAA fails to provide any evidence suggesting that permitting recreational or subsistence fishing activities as proposed will be inconsistent with ecosystem protection. Not only is NOAA's finding arbitrary and unsupported by any evidence, it suggests arbitrary discrimination against diverse user groups on the basis of conjecture and surmise.
4. Nowhere does the Findings document state whether and how the Council's recommendations are inconsistent with the purposes and policies of the NMSA. The Council requests that NOAA clarify its position on the consistency of its recommendations with the NMSA.
5. The Findings document also fails to define ecosystem or biological "integrity". Because this phrase has become an essential part of this discussion, the Council requests that NOAA include a definition of these terms as well as scientifically based quantitative methodologies for assessing the impacts of human activities on ecosystem or biological integrity in its Draft Environmental Statement and any other analytical documents on the proposed NWHI sanctuary.

In summary, the Findings document is replete with unsupported conjecture, misstatements, and mischaracterizations of Council statements. More importantly, the Findings document summarily rejects a carefully-crafted fishery management proposal that incorporates a detailed framework for ecosystem-based management, harvest guidelines, closed areas, limited entry programs, and vessel size limits without any credible analysis. The conclusions contained in the Findings document leave the Council with the impression that the standardless process

proposed in your October 24, 2005, letter to develop fishery management programs will have little, if any, influence, on the pre-determined decision to curtail or eliminate all fishing in the proposed sanctuary.

Summary of Procedural and Substantive Issues Concerning the Findings

A number of significant procedural and substantive deficiencies exist regarding NOAA's October 24, 2005, Findings document that bear on the Agency's consideration of the Council's proposal. In general, the Council believes the process used by the Agency to evaluate Council proposals and to develop sanctuary goals and objectives has been biased, and not conducted in a manner that would instill confidence in Agency decisions emanating from it.² Beyond these issues, the Council remains deeply concerned with the legal sufficiency of NOAA's October, 2005, Findings document due to the Agency's failure to comply with NEPA, the Data Quality Act, the APA, the MSA, and the NMSA.

National Environmental Policy Act Compliance

The Council is unclear whether NOAA's development of proposed sanctuary goals and objectives used to evaluate the Council's proposed fishing management regulations adequately comply with the requirements of NEPA. As reviewing courts have indicated, adoption and implementation of programmatic management plans require federal agencies to comply with NEPA. In the present situation, NOAA relies upon proposed sanctuary goals and objectives developed in furtherance of NWHI sanctuary designation to reject the Council's proposed fishery management programs under section 304(a)(5) of the NMSA. However, to date, NOAA has not completed any meaningful NEPA evaluation of existing goals and objectives, but instead intends to do so through future NEPA processes concerning sanctuary designation.

The Council believes it premature to reject its proposed fishery management programs under NMSA Section 304(a)(5) until such time that NOAA has completed an adequate NEPA review of the proposed goals and objectives for the NWHI sanctuary. We request that NOAA clarify how its development of its proposed NWHI sanctuary goals and objectives, and NOAA's subsequent rejection of the Council's April 14, 2005, draft regulations, complies with the requirements of NEPA.

Data Quality Act Compliance

Section 515 of the Treasury and General Government Appropriations Act (the Data Quality Act or Information Quality Act) requires that federal agencies issue information quality guidelines that ensure and maximize the quality, objectivity, utility and integrity of information disseminated by the agency; establish administrative mechanisms that allow affected persons to seek and obtain correction of information that does not comply with agency-specific quality

² During the formulation of proposed sanctuary goals and objectives, the Council repeatedly attempted to ensure that meetings and advisory processes were conducted in a fair and open manner to facilitate the use of the best available scientific and commercial data. However, despite its repeated attempts to facilitate such meetings, the Council was repeatedly met with resistance, and in some cases, open hostility. The Council intends to submit a more thorough record of these proceedings for your reference.

guidelines or the "umbrella" information quality guidelines; and make annual reports to OMB regarding the number and disposition of requests for correction of information. If an agency is responsible for disseminating influential scientific, financial, or statistical information, agency guidelines shall include a high degree of transparency about data and methods to facilitate the reproducibility of such information. See 67 Fed. Reg. 8452 (February 22, 2002)(OMB Data Quality Act Guidelines).

According to both OMB and NOAA Data Quality Act policies, transparency of agency decisions is an important component of Data Quality Act compliance. In the present case, the rationale behind NOAA's Findings is far from transparent, and this lack of transparency calls into question the underlying data upon which the Findings are based. OMB policies likewise indicate support for the use of independent peer review of scientific information. However, the Findings document does not appear to have undergone such review, and information contained in it does not appear to comply with the requirements of the Act.

We request that NOAA clarify the processes it has used to comply with the Data Quality Act in preparing the October, 2005 Findings document, including the basis for any certifications made under the Act. In accordance with Department of Commerce policies, we request that the Agency make timely and public corrections of information contained in the October, 2005 Findings and associated documents in the event such information does not comply with applicable information quality guidelines.

Administrative Procedures Act Compliance

As with all federal government actions, NOAA must insure that its decisions are not "arbitrary or capricious" under the APA. See 5 U.S.C. § 706(2)(A). Simply stated, the APA requires agencies to articulate a rational basis for their decisions based upon the record before the agency.

The Council is concerned that conclusions contained in NOAA's Findings document concerning the Council's proposed fishery management regime are not supported by any scientific information, or the record before the agency. The Council's April 14, 2005, recommendations and associated background material provided ample evidence to support adoption of the Council's draft regulations. NOAA however, has rejected those recommendations on the basis of speculation, surmise, and conclusory statements that are not supported by any factual or scientific information. Further, information used by the Agency in its Findings document is inaccurate, and as explained above, the Findings document misinterprets Council positions and findings regarding the status of fishery resources in the NWHI.

Through this letter, the Council requests a complete copy of the Agency's administrative record supporting its October 24, 2005 Findings document. The Council intends to review the complete record before the Agency in this matter to verify the integrity of scientific and other information used by the Agency to arrive at its decision. Upon completing its review, the Council will provide NOAA with a detailed summary of its review, including any additional scientific, economic, or other information omitted from the Agency's consideration.

Magnuson-Stevens Act and National Marine Sanctuaries Act Consistency and Compliance

As discussed in the October, 2005, Findings document, section 304(a)(5) of the NMSA the Council is entitled to prepare draft fishing regulations that fulfill the purposes and policies of the NMSA, and the goals and objectives of the proposed sanctuary. Proposed regulations shall be accepted and issued as proposed regulations unless NOAA finds they do not fulfill the purposes and policies of the NMSA, or the goals and objectives of the proposed sanctuary. In preparing draft fishing management programs under Section 304(a)(5) of the NMSA, the Council must comply with the requirements of the MSA.

First and foremost, the Council believes that the MSA provides an appropriate and well-defined process for developing fishery management programs while the NMSA lacks standards, guidelines, and clear protocols for developing such programs. As a result, the Council believes it is appropriate for the NOAA to defer to MSA processes for the development of fishing regulations within designated sanctuaries.

Second, in the present case, the Council believes that proposed sanctuary goals and objectives, and NOAA's interpretation of NMSA purposes and policies, are not supported by the record, and are inconsistent with the statute itself. Both the NMSA and MSA explicitly contemplate that commercial, recreational, and subsistence fisheries constitute permissible uses of marine sanctuaries. NOAA's interpretation of the NMSA however, and its development of narrowly focused sanctuary goals and objectives, contradicts such uses, and reflects an intention by the Agency to frustrate congressional intent by finding that any responsible fishery management program is, by definition, inconsistent with the NMSA. Clearly, this is not what Congress intended in passing these laws.

Finally, the Council believes that when direct conflicts exist between implementation of the MSA and the NMSA, such as in this case, the Agency should develop clear protocols and procedures for resolving such conflicts with the appropriate fishery management council. To date, the Agency has failed to engage in an open and honest discussion about the application of these statutes, and has instead deferred to internal Agency decision makers who are not accountable to the public for their decisions.

We request that NOAA provide the Council with any policies or protocols developed to date that discuss how NOAA intends to evaluate fishery management proposals under both the NMSA and MSA. To the extent that NOAA has not yet developed such policies or protocols, we recommend that NOAA convene a workgroup consisting of Council Chairs, appropriate congressional representatives, and NOAA managers to discuss the formulation of such policies and protocols.

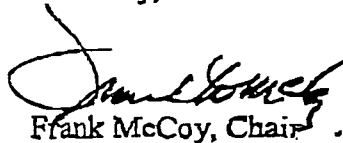
Summary and Conclusions

For the reasons outlined above, the Council respectfully requests that NOAA withdraw its October 24, 2005, Findings, concerning the Council's April 14, 2005, proposed fishery management regulations for the proposed NWHI marine sanctuary, and that NOAA engage in an open and collaborative process with the Council to develop appropriate fishery management programs for the proposed NWHI sanctuary.

In furtherance of these requests, the Council requests a complete copy of the Agency's administrative record supporting its October, 2005, Findings. We also request the opportunity to meet with you and your staff to discuss the scientific and legal basis for your findings in more detail.

Thank you for your consideration of these comments. Please contact Kitty Simonds, Executive Director, Western Pacific Regional Fishery Management Council, if you have any questions regarding this request.

Sincerely,



Frank McCoy, Chair

Western Pacific Regional Fishery Management Council

Appendix A. Summary of Council Proposals and NOAA Findings

1. Overall Council Recommendations

- Moratorium on coral reef, precious coral and crustacean fisheries until a science-based Fishery Ecosystem Plan containing ecosystem approaches to management is developed by the Council, in consultation with NOAA Fisheries and the NMSP;
- CDP permits with exemption for Native Hawaiians from moratoria
- Maximum number of bottomfish permits
- Permit and reporting for pelagic trolling

NOAA Findings: Does not fulfill the goals and objective of the proposed sanctuary and the purpose and policies of the NMSA.

Rationale: Council failed to identify criteria that would be used to end, or the nature of the specific process for ending the moratoria. This approach fails to provide limits or controls necessary to maintain ecosystem integrity

2. Precious Coral Fishing

- Moratorium on precious coral fishing until a science-based Fishery Ecosystem Plan containing ecosystem approaches to management is developed by the Council, in consultation with NOAA Fisheries and the NMSP.
- Under the Council's recommendation to the NMSP, all precious coral harvest would be prohibited until the Council in consultation with NOAA Fisheries and the NMSP could develop a science based FEP evaluating the efficacy of the current 1,000 kg harvest limit on maintaining precious coral stocks and if necessary, implement further limits and controls to maintain ecosystem integrity.

NOAA Findings: Does not fulfill the goals and objective of the proposed sanctuary and the purpose and policies of the NMSA.

Rationale: The significance of the precious coral beds to maintaining the natural character and biological integrity of the region's ecosystem demonstrates it is appropriate to prohibit commercial precious coral fishing, consistent with Objectives 7b and 7c.

Prohibition is further supported by recent concerns over the black coral fishery in the main Hawaiian Islands (cites overfishing by 5 fishermen).

Fails to provide limits or controls necessary to maintain ecosystem integrity, particularly given the uncertainty of impacts associated with such activity.

3. Coral Reef Species Fishing

- Moratorium on coral reef fishing until a science-based Fishery Ecosystem Plan containing ecosystem approaches to management is developed by the Council, in consultation with NOAA Fisheries and the NMSP.

NOAA Findings: Does not fulfill the goals and objective of the proposed sanctuary and the purpose and policies of the NMSA.

Rationale: The available scientific record readily demonstrates the coral reef ecosystems are significant to maintaining natural character and biological integrity of the region's ecosystems; their significance readily supports the conclusion it is appropriate to prohibit coral reef fishing consistent with objective 7c.

The available evidence supports the conclusion allowing harvesting commercial harvesting of coral reef species would likely result in a significant adverse impact to the proposed sanctuary's ecosystems and should be prohibited to maintain natural character and biological integrity of the region's ecosystems

Need to limit and control fishing and limit access only for activities consistent with long-term ecosystem protection.

4. Crustacean Fishing

- Moratorium on crustacean fisheries until a science-based Fishery Ecosystem Plan containing ecosystem approaches to management is developed by the Council, in consultation with NOAA Fisheries and the NMSP.

NOAA Findings: Does not fulfill the goals and objective of the proposed sanctuary and the purpose and policies of the NMSA.

Rationale: Overfishing, species shift, lack of appreciable rebuilding, unknowns regarding vulnerability of the species to natural and anthropogenic perturbations, ecological impact of slipper lobsters replacing spiny lobsters, likely importance of lobsters in monk seal diet

5. Bottomfish/Pelagic Fishing

NOAA Findings: Does not fulfill the goals and objective of the proposed sanctuary and the purpose and policies of the NMSA.

Rationale: Marine Zoning was deemed by NOAA as a fundamental management tool of an ecosystem-based management approach. Limited entry is not based on ecosystem considerations and could raise the number of permits compared to current levels.

Council recommendation does not incorporate limits or controls on bottomfishing that could for the basis for developing an ecosystem-based management approach because it does not include representative habitats (especially deep-water slopes and pelagic areas) for target species.

The ecological impacts of bottomfishing, such as the role of metapopulation structure, biomass removal, and spatial movement between banks are also largely unknown.

Lack of evidence to demonstrate how limiting fishery to 17 permits is consistent with ecosystem protection or errs on the side of protection in the face of uncertainty

Council no-take MPAs too shallow and would allow fishery to operate in "sensitive areas." Council does not include mandatory VMS

6. Pelagic Trolling

NOAA Findings: Does not fulfill the goals and objective of the proposed sanctuary and the purpose and policies of the NMSA.

Rationale: Goal and objective of sanctuary designation calls for maintaining ecosystem integrity by limiting and controlling fishing activities using an ecosystem-based management approach.

Council fails to provide limits on commercial pelagic fishing outside of sensitive areas providing for an ecosystem-based management approach in light of the uncertainties with the health of pelagic stocks and their importance to the region's ecosystems.

Council would still allow pelagic fishing in sensitive habitats.

7. Subsistence Fishing

NOAA Findings: Does not fulfill the goals and objective of the proposed sanctuary and the purpose and policies of the NMSA.

Rationale: High degree of uncertainty associated with NWHI fisheries and the vulnerability of target species and ecosystems to natural and anthropogenic perturbations.

No definition of the actual meaning of "subsistence," has been provided that could be used to understand the difference between an application for a proposed CDP permit that would be used for commercial fishing from an application for a proposed CDP permit that would be used for subsistence use.

Council would allow non-Native Hawaiian subsistence fishing to occur within the sanctuary boundary, outside of no-take zones.